

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

JOHN W. SMITH v. WAYNE BRANDON, WARDEN

**Direct Appeal from the Circuit Court for Hickman County
No. 06-5011C Jeffrey S. Bivins, Judge**

No. M2006-01042-CCA-R3-HC - Filed November 3, 2006

Petitioner, John W. Smith, appeals the trial court's denial of his petition for habeas corpus relief. The State has filed a motion pursuant to Rule 20, Rules of the Court of Criminal Appeals of Tennessee, for this Court to affirm the judgment of the trial court by memorandum opinion. After a thorough review of the record, we grant the motion and affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Hickman County Criminal Court
Affirmed Pursuant to Rule 20 of the Tennessee Court of Criminal Appeals.**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

John W. Smith, Only, Tennessee, *pro se*, for the appellant

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; and Ronald L. Davis, District Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

On May 10, 2001, Petitioner pled guilty to three counts of aggravated robbery for which he was sentenced as a Range III, persistent offender and ordered to serve concurrent twenty-year sentences; and one count of facilitation of especially aggravated robbery for which he was sentenced as a Range III, persistent offender and ordered to serve a twenty year sentence, to be served consecutive to the aggravated robbery convictions, for a total effective sentence of forty years in the Department of Correction. On February 27, 2006, Petitioner filed a *pro se* petition for a writ of habeas corpus, which the trial court summarily dismissed on April 11, 2006. On April 19, 2006, Petitioner filed a motion for "finding of facts, law and conclusion." The trial court likewise denied that petition on April 25, 2006. Petitioner then filed a timely notice of appeal. On appeal, Petitioner raises issues that were not raised in the petition for habeas corpus relief which he initially submitted to the trial court. Issues not properly raised in the trial court cannot be raised for the first time on appeal. *See Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). Accordingly, we will address only those issues that Petitioner raised in the trial court and now raises on appeal. On appeal, Petitioner argues that he is entitled to habeas corpus relief because (1) the judgments against him

violate Tennessee Code Annotated section 40-20-111, and (2) the trial court did not have authority to accept his guilty pleas in exchange for concurrent sentences because the plea agreement violated Rule 32(c)(3)(A) of the Tennessee Rules of Criminal Procedure.

Article I, section 15 of the Tennessee Constitution guarantees the right to seek habeas corpus relief. Tennessee Code Annotated section 29-21-101 *et seq.* codifies the applicable procedures for seeking a writ. While there is no statutory time limit in which to file for habeas corpus relief, Tennessee law provides very narrow grounds upon which such relief may be granted. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). In Tennessee, “[a]ny person imprisoned or restrained of his liberty, under any pretense whatsoever, except [those held under federal authority], may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment and restraint.” *Church v. State*, 987 S.W.2d 855, 857 (Tenn. Crim. App. 1998); T.C.A. § 29-21-101. A habeas corpus petition may be used only (1) to contest void judgments which are facially invalid because the convicting court was without jurisdiction or authority to sentence a defendant; or (2) if defendant’s sentence has expired. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993). The petitioner bears the burden of establishing either a void judgment or an illegal confinement by a preponderance of the evidence. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). If the petitioner carries this burden, he is entitled to immediate release. *Id.* However, “where the allegations in a petition for writ of habeas corpus do not demonstrate that the judgment is void, a trial court may correctly dismiss the petition without a hearing.” *McLaney v. Bell*, 59 S.W.3d 90, 93 (Tenn. 2001) (citing T.C.A. § 29-21-109 (2000)).

In his first issue, Petitioner contends that his judgments of conviction are void because pursuant to Tennessee Code Annotated section 40-20-111(a), the trial court was without jurisdiction to order count 2 to be served concurrent with counts 3 and 4. He asserts that according to Tennessee Code Annotated 40-20-111(a), judgments of conviction must be entered in a progressive fashion. He specifically cites the portion of the statute which states, “[w]hen any person has been convicted of two (2) or more offenses, judgment shall be rendered on each conviction after the first.” He argues that with respect to his case, the trial court lacked authority to order count 2 to be served concurrent with counts 3 and 4 because “when judgment was pronounced on count two there was no conviction [for] counts 3 and 4.” Therefore, he argues that the judgments could not have been entered in a progressive fashion and concurrent sentencing was not proper. Petitioner argues that because the trial court did not have authority to enter the concurrent sentences the judgments against him are void.

Petitioner does not contend that his sentence has expired, thus, he is entitled to relief only if the convicting judgments are void. Pursuant to Tennessee Code Annotated section 40-20-111(a), it is within the discretion of the trial court whether to run the sentences for multiple convictions concurrent to one another. There is nothing in the record on appeal indicating that the trial court abused its discretion in ordering Petitioner’s sentences to run concurrently. As such, the judgments of conviction reflect valid, legal sentences ordered in accordance with Tennessee’s sentencing guidelines. Accordingly, we conclude that with respect to this issue, Petitioner has failed to state a cognizable claim for habeas corpus relief.

In his next issue, Petitioner contends that the trial court did not have authority to accept his guilty pleas in exchange for concurrent sentences because the concurrent sentences violated Rule 32(c)(3)(A) of the Tennessee Rules of Criminal Procedure. Petitioner asserts that pursuant to Rule 32(c)(3)(A), consecutive sentencing is mandatory where a defendant commits a felony while on parole for another felony. Tenn. R. Crim. P. 32(c)(3)(A). He argues that because he was convicted of the current charges while on parole for another felony, the concurrent sentences imposed by the trial court for counts 2, 3, and 4 are invalid because they were not ordered to be served consecutive to one another as mandated by Rule 32(c)(3)(A).

Our Supreme Court has previously held that “[a]ny prisoner who is convicted in this state of a felony, committed while on parole from a state prison, jail or workhouse, shall serve the remainder of the sentence under which the prisoner was paroled, or such part of that sentence, as the board may determine before the prisoner commences serving the sentence received for the felony committed while on parole.” *Hogan v. Mills*, 168 S.W.3d 753, 756 (Tenn. 2005). The court further noted that “Rule 32(c)(3) mandates that new sentences run consecutively to the prior sentence ‘whether the judgment explicitly so orders or not.’ Thus, the new sentences run consecutively to the prior sentence even if the judgment is silent in this regard.” *Id.* However, the Court went on to explain that although sentences for the new conviction(s) must run consecutive to sentences for the old conviction(s), there is no requirement that new convictions be served consecutively to one another. *Id.* Therefore, all new conviction(s) may be served concurrent to one another so long as they are consecutive to the old conviction(s). As such, Petitioner’s concurrent sentences for his new convictions are not void because there was no mandatory requirement that the sentences be served consecutively to one another. Accordingly, Petitioner is not entitled to relief on this issue.

The judgment was rendered in this matter in a proceeding before the trial court without a jury, and the judgment was not a determination of guilt, and the evidence does not preponderate against the finding of the trial court.

CONCLUSION

Upon review of this matter, this Court concludes that no error of law requiring a reversal of the judgment of the trial court is apparent on the record. Petitioner has failed to present any evidence that his sentence has expired or that his conviction is void. Accordingly, the trial court’s summary dismissal of the petition was proper and the State’s motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

THOMAS T. WOODALL, JUDGE